SUPREME COURT OF THE STATE OF NEW YORK
RICHMOND COUNTY: CRIMINAL TERM, PART 14

THE PEOPLE OF THE STATE OF NEW YORK,	:	
-against-	:	Ind. No. 177/2019
ANTHONY COMELLO,	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ANTHONY COMELLO'S OMNIBUS PRETRIAL MOTIONS

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PRELIMINARY STATEMENT AND INTRODUCTION

This memorandum of law is submitted in support of defendant Anthony Comello's pretrial motions for an Order: i) compelling the People to turn over certain outstanding discovery items, which have been previously requested, pursuant to CPL § 240.20; ii) suppressing evidence recovered as a result of numerous searches of Mr. Comello's property, vehicle, and his family's residences, or, in the alternative, ordering a hearing pursuant to *Mapp v. Ohio*, 367 U.S. 643 (1961) to determine their admissibility; iii) granting an inspection of the Grand Jury minutes and dismissing the Indictment should any defect be identified therein; iv) suppressing the defendant's statements to law enforcement, or in the alternative, ordering a hearing pursuant to *People v. Huntley*, 15 N.Y.2d 72 (1965) to determine their admissibility; v) compelling the People to provide the names and contact information for all potential trial witnesses; vi) compelling the People to turn over all *Brady*[1] material; vii) compelling the People to turn over all *Giglio*[2] material; viii) compelling the People to provide a date whereby all *Rosario*[3] material will be disclosed; and ix) compelling the People to provide notice of any prior crimes or bad acts that they intend to offer at trial, and a pretrial hearing to determine their admissibility pursuant to *People v. Ventimiglia*, 52 N.Y.2d 350, 360 (1981) and *People v. Sandoval*, 34 N.Y.2d 371, 375 (1974).

Defendant Anthony Comello is charged in a three-count Indictment with one count of Murder in the Second Degree, in violation of PL § 125.25-1 (Count One); and two counts of Criminal Possession of a Weapon in the Second Degree, in violation of PL §§ 265.03-1(b) and

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

[2] *Giglio v. United States*, 405 U.S. 150 (1972).

[3] *People v. Rosario*, 9 N.Y.2d 286 (1961).

265.03-3 (Counts Two and Three). In essence, the People allege that Mr. Comello brought a firearm to Francesco Cali's Staten Island home and intentionally shot Mr. Cali, causing his death.[4]

First, the Court should direct the People to turn over certain discovery items which the defense has requested and which the People have refused to provide. Specifically, search warrants were executed on both the purported victim's house and vehicle, but the defense has been denied any information regarding the items recovered. Upon information and belief, these warrants resulted in the seizure and vouchering of several items which the defense respectfully submits are relevant and material to this matter. The defendant has formally requested that the search warrant vouchers and returns be turned over, a request which has been refused. In addition, while the People have produced copies of certain police paperwork, many of these documents contained attachments in their original form, which also have not been provided to the defense, despite repeated requests. Further, though the People have communicated a willingness to provide Mr. Comello with crime scene photographs, surveillance videos of the incident location for the three hours before and after the purported shooting occurred, and Mr. Cali's medical records, they have still not been turned over as of the date of this motion. The Court should order the People to immediately provide those materials as well.

Second, Mr. Comello requests that the Court suppress any physical evidence recovered as a result of the search warrants executed at his family's residences and his vehicle. Additionally, subsequent search warrants authorizing searches of the defendant's cellular telephone and other electronics that were seized pursuant to the earlier warrants and which then became the subjects

[4] *See* April 24, 2019 Richmond County District Attorney's Office Press Release, *Staten Island Man Indicted for Murder in the Second Degree*, available at https://www.statenislandda.org/wp-content/uploads/2019/05/Staten-Island-Man-Indicted-for-Murder-in-the-Second-Degree-compressed.pdf (last viewed June 18, 2019).

of separate search warrants should also be suppressed. Such extraordinarily broad searches on such a wide variety of locations and items were impermissible as the affidavits do not support a reasonable conclusion that the warrants would result in the recovery of evidence. In the alternative, a hearing pursuant to *Mapp v. Ohio* should be conducted in order to determine whether any items recovered pursuant to these searches are admissible. 367 U.S. 643.

Third, in order to legally indict the defendant on the charge of Murder in the Second Degree, the People were required to present evidence that the defendant intended to cause the death of Mr. Cali. Simply put, the People could not have possibly introduced such evidence to the Grand Jury as the intent to commit murder **cannot** be inferred from the simple fact that someone was killed, it must be proven by other factors. *People v. Patterson*, 39 N.Y.2d 288, 302 (1976). The unique circumstances presented here demonstrate that Mr. Comello had no intention to commit any acts of violence and only took action against Mr. Cali when the decedent made a furtive movement close to his waistband, putting Mr. Comello in reasonable fear for his own life.

Fourth, the statements that Mr. Comello allegedly made to law enforcement on March 16, 2019 should be suppressed as involuntarily made and the products of a custodial interrogation. In the alternative, the Court should order a hearing pursuant to *People v. Huntley* to determine their admissibility at trial. 15 N.Y.2d 72 (1965).

Fifth, the defendant respectfully requests that the People be directed to turn over the names of their trial witnesses to ensure that Mr. Comello may "fully and equally participate in the truth-finding process." *People v. Bottom*, 76 Misc.2d 525, 527, 351 N.Y.S.2d 328 (Sup. Ct. N.Y. Co. 1974); *People v. Andre W.*, 44 N.Y.2d 179, 186 (1978). Here, no "compelling

circumstances" exist to permit withholding witness information, and accordingly, it should be disclosed. *People v. Rivera*, 119 A.D.2d 517, 519, 501 N.Y.S.2d 38 (1st Dept. 1986).

Finally, Mr. Comello requests that the Court require the People to provide a date whereby all *Rosario* material will be disclosed, and order the People to turn over: a) any *Brady* material; b) any *Giglio* material; and c) notice of any prior crimes or bad acts of the defendant that the People intend to offer at trial pursuant to *Ventimiglia* and *Sandoval*, and order a pretrial hearing to determine their admissibility.

STATEMENT OF FACTS

I. Background

Beginning with the election of President Trump in November 2016, Anthony Comello's family began to notice changes to his personality. He began to take an interest in politics, something he had not previously been involved in. Approximately five to six weeks prior to the incident which gives rise to this case, Mr. Comello, the defendant in this case, became increasingly vocal about his support for "QAnon," a conspiratorial fringe right-wing political group. But Mr. Comello's support for QAnon went beyond mere participation in a radical political organization, it evolved into a delusional obsession.

QAnon follows the postings of an individual (or group of individuals) who write using the pseudonym "Q." Q and the QAnon followers describe themselves as patriots, and their mission is to protect Western civilization and American values from an international criminal conspiracy which seeks to ruin America.[5] This global cabal is commonly referred to as "the Deep State." The Deep State's main opposition, according to Q's missives, is President Trump and his ardent

[5] *See* Zuckerman, Ethan, *QAnon and the Emergence of the Unreal*, Journal of Design and Science, https://jods.mitpress.mit.edu/ (last accessed July 18, 2019).

supporters, who will eventually expose the entire conspiracy and ensure that every criminal is brought to justice.[6]

As part of his delusion, the defendant believed that he had been given secret knowledge about the Deep State, and that Q was communicating directly with him so that the defendant could play a grand role in the conflict to save the American way of life. Because of his self-perceived status in QAnon, Mr. Comello became certain that he was enjoying the protection of President Trump himself, and that he had the president's full support.

Mr. Comello grew to believe that several well-known politicians and celebrities were actually members of the Deep State, and were actively trying to bring about the destruction of America. This led Mr. Comello on two separate occasions to attempt to effect citizen's arrests of politicians who belong to the Democratic Party. In February 2019, Mr. Comello attempted to personally arrest Mayor Bill de Blasio at Gracie Mansion. He was rebuffed by the mayor's security detail but approached Mayor de Blasio's residence calling for him to come outside and submit to a citizen's arrest for election fraud.[7] Shortly thereafter, on another occasion, the defendant tried to arrest and detain California Congressional Representatives Maxine Waters and

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[6] For additional background information regarding Q and QAnon, please see the following articles: Mann, Ted, *The Story of Q,* Tablet Magazine, https://www.tabletmag.com/scroll/264627/the-story-of-q (last accessed July 10, 2019);

Feldman, Brian, *QAnon is Just the Standard Trump Train Now,* Intelligencer Magazine, http://nymag.com/intelligencer/2019/04/what-the-end-of-the-mueller-report-means-for-qanon.html#comments (last accessed July 11, 2019);

Carter, Brandon, *What is QAnon? The Conspiracy Theory Tiptoeing into Trump World*, National Public Radio, Inc., https://www.npr.org/2018/08/02/634749387/what-is-qanon-the-conspiracy-theory-tiptoeing-into-trump-world (last accessed July 11, 2019).

[7] Mr. Comello has cellular telephone video footage of himself attempting to effect this citizen's arrest, which will be made available to the Court upon request.

Adam Schiff in the vicinity of the Southern District of New York Federal Courthouse. Mr. Comello believed the two Congress members were in the area, so he went to the U.S. Marshal's office at 500 Pearl Street, New York, New York but was unsuccessful in securing their assistance in his attempt to arrest both representatives.

In addition to politicians and celebrities, Mr. Comello concluded that the Deep State also includes individuals associated with organized crime. He ardently believed that Francesco Cali, a boss in the Gambino Crime Family,[8] was a prominent member of the Deep State, and, accordingly, an appropriate target for a citizen's arrest.

II. The Incident at 25 Hilltop Terrace, Staten Island, New York

On March 13, 2019, shortly before 9:17 p.m., Anthony Comello drove his 2017 GMC Sierra pick-up truck to 25 Hilltop Terrace, Staten Island, New York. After spending some time in the vicinity of that location, Mr. Comello backed his vehicle into Francesco Cali's 2017 Cadillac Escalade which was parked on the street in front of that address.

After the defendant struck Mr. Cali's vehicle, he exited his truck and inspected the damage. Subsequently, Mr. Cali exited 25 Hilltop Terrace, his home, and met the defendant on his front yard. The two men shook hands and spoke as Mr. Cali also observed the damage to the vehicles. While the two men were standing near their respective vehicles, Mr. Comello informed Mr. Cali of his true intention to effect a citizen's arrest, and ordered Mr. Cali to submit to detention. The defendant had brought handcuffs with him, and planned to restrain Mr. Cali and bring him to the appropriate authorities to answer for the criminal actions which Mr. Comello believed he had taken part in. After a heated exchange, Mr. Cali made a furtive action with his

[8] The Gambino Crime Family is one of the five crime families in New York City which comprise the mafia.

hand and Mr. Comello became afraid for his life. He reached into his vehicle, withdrew his gun, and shot Mr. Cali in self-defense.

Mr. Comello left the scene and returned home. Later that night, the police executed search warrants at 25 Hilltop Terrace, Staten Island, New York for surveillance footage and video as well as on the 2017 Cadillac which belonged to Mr. Cali. Ultimately, the NYPD was able identify the defendant as the shooter. On March 15, 2019 search warrants were issued for the GPS information for Mr. Cali's Cadillac and Mr. Comello's GMC truck. Additionally, on that same day, the People received authorization to have Verizon place a pen register and trap and trace device on Mr. Comello's cellular telephone line.

On March 16, 2019, law enforcement stopped a vehicle driven by the defendant's mother, Nicole Comello, in the vicinity of 14 Cadiz Drive, Brick, New Jersey and proceeded to follow her to that address. The house belongs to the defendant's parents. The defendant, along with members of his family, was present at the home, and Mr. Comello surrendered to the police peacefully and accompanied them to the Ocean County Prosecutor's office in Toms River, New Jersey. At the same time, the NYPD was executing search warrants on Mr. Comello's permanent residence at 213 Retford Street, Staten Island, New York. The following day, search warrants were obtained for a number of additional electronic devices seized pursuant to the warrant executed at 213 Retford Street. On April 1, 2019, law enforcement received authorization to conduct a search of the defendant's Instagram accounts, "Amello_0908," and "realamericasvoice_," as well as the account for "wwg1wga," which the defendant had been corresponding with. Overall, the police executed 37 search warrants in connection with this investigation.

While in custody on March 16, 2019, the defendant was interrogated for hours regarding

the incident while being videotaped.

The defendant was indicted by a Grand Jury on April 18, 2019 and arraigned on the Indictment on April 24, 2019 in Richmond County Supreme Court. The defense timely filed a notice of intent to office evidence of mental disease or defect at trial on May 3, 2019.

ARGUMENT

POINT I

THE COURT SHOULD COMPEL THE PEOPLE TO PRODUCE OUTSTANDING DISCOVERY

The defendant has repeatedly requested, via email and telephone conversation dating back to June 11, 2019, certain discovery items which have still not been provided by the People. The People have informed the defendant that they do not intend to turn over the search warrant vouchers or returns for the warrants executed on Mr. Cali's home and vehicle. *See* June 18, 2019 email from ADA Michelle Molfetta, attached as Exhibit A. Other items, such as the photographs, video footage and police reports concerning the crime scene, DD5 attachments, surveillance footage of the location prior to and subsequent to the alleged incident, and Francesco Cali's medical records have been promised but have not yet been received. *See*, June 12, 2019 email from ADA Michelle Molfetta, attached as Exhibit B. All of these items are inherently discoverable and the Court should now order their immediate disclosure. *See* CPL §§ 240.20(1)(c), (d), (g) and (h).

I. Search Warrant Vouchers and Returns

New York courts have long held that search warrant materials are discoverable under CPL § 240.20(1)(h). *People v. Chahine*, 150 Misc.2d, 242, 243, 568 N.Y.S.2d 526 (Crim. Ct. N.Y. Co. 1991); *People v. Brown*, 104 Misc.2d 157, 163, 427 N.Y.S.2d 722 (Crim. Ct. Queens Co. 1980). Failure to provide this information "tends to put the strategic planning of the defense in

the hands of the prosecution ... making the prosecutor the architect of a case, a circumstance that does not comport with the minimal standards of justice." *People v. Arthur*, 175 Misc.2d 742, 764, 673 N.Y.S.2d 486 (Sup. Ct. N.Y. Co. 1997) *quoting Brady v. Maryland*, 373 U.S. 83, 88 (1963). Further, under CPL § 690.50(5), after the execution of a search warrant, the written inventory of the property recovered – the search warrant return – **must be filed with the Court without unnecessary delay**. *See* CPL § 690.50(5). The Court file in a criminal case is a public record. *People v. Hinton*, 31 N.Y.2d 71, 75 (1972) (unless the People provide a compelling reason otherwise, a criminal case, up to and including the trial itself, is a matter of public record); N.Y. Jud. Law §§ 255 and 255-b. Consequently, absent a protective order, not only does the defendant have a right to this information, any member of the general public is also granted access upon merely requesting the court clerk for the file.

The People have offered no valid explanation for why they believe that CPL § 240.20(1)(h) does not apply to the search warrant vouchers and returns in this particular case. They have cited no statute nor case law supporting their position that this information can legally be withheld. Nor have they sought any protective order which would restrict the defendant's access to information he would otherwise be entitled to see. Rather, the People have arbitrarily decided that they simply do not wish to turn over information which Mr. Comello is constitutionally entitled to receive. *Chahine*, 150 Misc.2d at 243; *see also People v. Vanness*, 106 A.D.3d 1265, 1266, 965 N.Y.S.2d 227 (3rd Dept. 2013) (search warrant application, documents, and return provided to defense as part of discovery).

In a June 18, 2019 email, the People claimed that Mr. Comello was not entitled to a description of the items recovered during the executed search warrants because he lacks an expectation of privacy and the items seized do not belong to him. *See* Ex. A. This position is

clearly misguided and entirely misstates the applicable rule.[9] *Chahine*, 150 Misc.2d at 243. Whether the defendant has a reasonable expectation of privacy or ownership of a location or item to be searched only relates to the defendant's standing to contest, or controvert, the warrant. *See People v. Telfer*, 175 A.D.2d 638, 638, 572 N.Y.S.2d 571 (4th Dept. 1991). Standing is irrelevant in determining whether the defendant has a right to be informed of the specific items seized and vouchered during the execution of a search warrant. Indeed, as part of the Court file, once the search warrant return is filed, **any person** has a right to view it. *Hinton*, 31 N.Y.2d at 75; *Craig v. Harney*, 331 U.S. 367, 373 (1947); N.Y. Jud. Law §§ 255 and 255-b. Thus there can be no argument that a reasonable expectation of privacy is not a valid consideration as to whether the defendant may be privy to the information contained in the return. Indeed, all search warrant materials are **necessary** for Mr. Comello to make a determination about whether he, in fact, does have standing to challenge the warrants themselves and whether he should exercise his option to do so.

It is also of no consequence that the People have assured the defendant that they do not intend to introduce at trial any of the items recovered from the searches which are being deliberately hidden from the defendant. *See* Ex. A. The People do not have the authority to determine what they choose to disclose based on the strategic evidence they intend to present in their case-in-chief. *Andrew W.*, 44 N.Y.2d at 185. Such a policy completely vitiates a defendant's right to a fair trial. Due process concerns demand that the People disclose the items that are seized, as evidence, pursuant to search warrants issued as a part of the investigation, in order to afford the defendant the initial opportunity to challenge the warrants should he have standing and

[9] Moreover, if the People were to actually object to a discovery demand made by the defendant, they were required, under CPL § 240.35, to file written notice to the Court stating the grounds for the belief that the materials were not appropriately discoverable. That was not done here.

cause to do so. CPL § 240.20(1)(h). Further, the defendant has the right to introduce seized items at trial as he deems appropriate. Certainly, Mr. Comello is not required to rely on the People's representations that the items, deemed relevant enough by law enforcement agents to seize and voucher, are not discoverable just because the People intend to withhold them from the jury. Clearly, the situation may present itself where **the defendant** decides to introduce a piece of evidence which was collected as part of a search warrant execution because, for example, it supports the defense theory of self-defense (i.e. whether a weapon was found in Mr. Cali's vehicle, or in his home). Under the policy aspired to by the People, the defendant would remain ignorant of any helpful information which was discovered (and unable to independently discover this information) and would be entitled only to that which the prosecutor considers evidence of guilt sufficiently relevant to provide to the jury.

Law enforcement agents executed approximately 37 search warrants in this case. In addition to searching Mr. Comello's home, the pool house on the property, the house where he was apprehended, his vehicle, his cellular telephone, computer, tablet and social media accounts, detectives in this case also received authorization to search, *inter alia*, Mr. Cali's home and vehicle. Notably, the search of Mr. Cali's vehicle, which is where Mr. Cali was physically located at the time of the shooting, yielded a list of vouchered items nearly an entire page long, broken up over six distinct vouchers, memorialized on an NYPD follow-up report document referred to as a "DD5." *See*, March 14, 2019 DD5 follow-up report #51, attached as Exhibit C. The only reason that the defense has any information regarding this search is that this partial DD5 report was turned over in discovery and the detective who authored the document included a list of all items recovered and what voucher those items were placed under. However, **the People have redacted the entire document** so that, of the entire list, only the voucher numbers and a single

entry, "10 KEYS," is visible. The People also failed to provide the last page of the DD5 report, so that the defendant is unable to tell which detective drafted and electronically signed the document. As with their refusal to provide the search warrant returns, the People have offered no compelling reason why Mr. Comello is not entitled to the unredacted voucher information contained in this DD5.

The New York State legislature has recently made its position regarding discovery and disclosure of documents contained in the People's files crystal clear. *See* New York State Bill S01509C.[10] New York State will **require** the sharing of evidence, by default, between the prosecution and defense in what is termed "open file discovery."[11] As part of this new discovery statute, the People will be statutorily required to turn over a multitude of items which had previously not been codified in CPL § 240.20. While the defense recognizes that the bill becomes effective January 1, 2020, approximately four months from the date of the filing of this motion, the defendant respectfully requests that the Court take into account the legislature's understanding of the appropriate protections for a defendant in New York State. The lawmakers' intent on this issue could not be clearer; they envision a criminal justice process where the defendant is afforded a full and fair opportunity to view the evidence against him and to base his defense on that evidence without being forced to speculate. The People's continued refusal to turn over search warrant vouchers and returns – which are themselves discoverable – runs directly counter to the mindset behind this new legislation, and the Court should compel the People to make the appropriate disclosures.

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[10] The text of the enacted bill can be found at https://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=S01509&term=2019&Actions=Y&Text=Y

[11] *See*, *Discovery Reform in New York*, Center for Court Innovation, https://www.courtinnovation.org/sites/default/files/media/document/2019/Discovery_NYS-Summary.pdf (last accessed July 17, 2019).

II. Crime Scene Materials, Surveillance Video, DD5 Attachments and Medical Records

Under the Criminal Procedure Law, photographs and video footage which relate to the criminal action must be turned over, whether it concerns the crime scene or surveillance of the location (*see* CPL §§ 240.20(1)(d) and (g)). Additionally, medical records are specifically required to be disclosed to the defendant. *See* CPL § 240.20(1)(c).

Here, the People are not disputing that Mr. Comello is entitled to receive these remaining discovery items. *See* Ex. B (despite the People's representation, the defendant does not, in fact, have the attachments to the DD5's, nonetheless the People are not contesting that those items are properly discoverable). However, even though the defendant was arrested nearly four months ago, they remain outstanding, despite repeated requests by the defense for their production. In order for Mr. Comello to review these materials and discuss them with the undersigned counsel in time for them to have a meaningful impact on his defense, the Court should order the People to immediately turn them over to the defendant.

Regardless of whether the People have simply failed to provide the information which they previously agreed to turn over, or have steadfastly refused to provide the materials which Mr. Comello is legally permitted to obtain, the Court should now order the immediate disclosure of **all** outstanding discovery.

POINT II

ANY EVIDENCE OBTAINED THROUGH THE EXECUTION OF THE SEARCH WARRANTS MUST BE SUPPRESSED AS THE PEOPLE FAILED TO ESTABLISH SUFFICIENT PROBABLE CAUSE AND PARTICULARITY

During the course of the investigation in this case, approximately 37 search warrants were issued for the People to search various residences, vehicles, and seized electronic devices. Owing

to an insufficient probable cause demonstration in the applications and woefully deficient particularity in the warrants, Mr. Comello respectfully requests that the items seized from his person, vehicle, or property, as well as the fruits of these searches be suppressed, or in the alternative a *Mapp* hearing be conducted pursuant to CPL §§ 710.20, 710.40, 710.50 and 710.60. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Wong Sun v. U.S.*, 371 U.S. 471, 487-488 (1963); *People v. Reynolds*, 71 N.Y.2d 552, 558 (1988); *see also* U.S. Const. amend. IV.

Specifically, between March 16, 2019 and April 1, 2019, the People obtained approximately 23 warrants related specifically to the defendant's residences, vehicle, electronic devices, and social media accounts. The recitations of facts supporting the affidavits for these warrants are largely identical, with some minor variations depending on the specific location or item to be searched. However, under CPL § 690.35(3)(b), law enforcement is required to provide not only the specific location or item to be searched, but an explanation of why there is reasonable cause to believe that a search will result in evidence. Without an explanation of the nexus between the search location and evidence of some criminal activity, courts will invalidate a warrant as lacking probable cause. *People v. Acevedo*, 175 A.D.2d 323, 324 (3rd Dept. 1991) (invalidating search warrant when court concluded that the information presented could not have led law enforcement to believe a search was reasonably likely to result in incriminating evidence).

Here, these nearly indistinguishable factual statements fail to provide reasonable cause to believe that a search of the defendant's residence, or vehicle, or cellular telephone, computer/iPad, or social media account will actually lead to relevant evidence in the case. Instead, the affidavits contain a bare-bones account of the investigative steps used to identify the defendant and then simply requests the authority to search through these various items/locations because they **may possibly** contain evidence. For example, in the affidavit to search Mr. Comello's cellular

telephone and other electronic devices previously seized, the affiant, Detective Christopher Nunziato states:

> Based on the above-described facts and circumstances and my training and experience, I believe that the information sought including information stored on said cell phones and computers, including incoming and outgoing calls and text messages, and phone numbers stored therein, as well as emails, is and will be relevant to the current ongoing investigation for the aforementioned homicide of Francesco Cali.

See March 17, 2019 Affidavit of Det. Christopher Nunziato, attached as Exhibit D. The remainder of the factual portion of the application provides no justification for the claim that a search of these materials will lead to evidence. *See People v. Brown*, 40 N.Y.2d 183, 186 (1976) (search warrants cannot be issued on rumor, suspicion, or speculation of law enforcement); *see also Acevedo*, 175 A.D.2d at 324. Det. Nunziato's affidavit sets forth no factual allegations that an electronic device was somehow related to the crime itself, or that there is reason to believe, based on credible information, that emails from the defendant will actually pertain to the alleged crime. Instead, based on the nature of the charges, law enforcement is simply attempting a fishing expedition into every aspect of Mr. Comello's life to see if they can discover incriminating evidence without the appropriate justification for doing so.

Accordingly, these warrants lack the specificity required under CPL § 690.35(3)(b) and the Fourth Amendment of the United States Constitution and should be suppressed, or, in the alternative, a hearing should be ordered to determine whether the warrant applications were legally sufficient.

POINT III

MR. COMELLO IS ENTITLED TO INSPECTION OF THE GRAND JURY MINUTES AND TO DISMISSAL OF THE INDICTMENT IF THAT INSPECTION REVEALS ANY MATERIAL DEFECTS

Since Grand Jury proceedings are secret, *see* CPL § 190.25(4), it is incumbent upon a trial court to ensure that they were conducted in compliance with the various statutory requirements. Thus, "unless good cause exists to deny the [defendant's] motion to inspect the grand jury minutes, the court must grant the motion." CPL § 210.30(3). Moreover, if such inspection reveals "a significant failure to conform to one or more of the requirements set forth in CPL Article 190," the indictment must be dismissed.[12] *People v. Ehrlich*, 136 Misc.2d 514, 516, 518 N.Y.S.2d 742 (Sup. Ct., N.Y. Co. 1987).

In this case, there is a substantial likelihood that the following material defects occurred during the Grand Jury proceedings: i) the charges in the Indictment were not supported by sufficient and competent evidence; ii) the prosecutor, as legal advisor to the Grand Jury, failed to properly instruct it; and iii) procedural defects existed in the makeup and operation of the Grand

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[12] Alternatively, if the inspection reveals the possibility of a defect, the Court may order that the minutes be released to the defendant so that he may assist in determining the motion to dismiss. CPL § 210.30(3). As the Chairman of the Codes Committee and sponsor of the 1980 revisions of CPL § 210.30(3), wrote in his legislative memorandum:

> These minutes are ultimately disclosed anyway at a hearing or trial, so that the issue is not a question of confidentiality vs. disclosure, it is instead merely a question of timing, i.e., when the minutes will be disclosed. Unless a reason exists to delay disclosure it should be done during argument on their sufficiency. (Emphasis supplied).

Jury. In addition, the defendant requests that the Court carefully scrutinize the Grand Jury minutes to determine whether any additional procedural errors occurred.

A. Insufficiency of the Evidence that the Defendant Committed the Crimes Charged in the Indictment

Under CPL § 190.65(1), a Grand Jury may properly vote to indict for an offense only when

> (a) the evidence before it is legally sufficient to establish that such person committed such offense provided, however, such evidence is not legally sufficient when corroboration that would be required, as a matter of law, to sustain a conviction for such offense is absent, and
> (b) competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense.

In turn, CPL § 70.10(1) defines the phrase "legally sufficient" as "competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof." Further, "reasonable cause to believe that a person has committed an offense," according to CPL § 70.10(2),

> exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it. Except as otherwise provided in this chapter, such apparently reliable evidence may include or consist of hearsay.

Thus, a reviewing court must determine whether the People established a *prima facie* case with respect to each element of the crime. *See*, *Jennings*, 69 N.Y.2d at 103; *People v. Valles*, 62 N.Y.2d 36, 476 N.Y.S.2d 50 (1984); *People v. Dunleavy*, 41 A.D.2d 717, 341 N.Y.S.2d 500 (1st Dept.), *aff'd*, 33 N.Y.2d 573, 347 N.Y.S.2d 448 (1973). The adequacy of this showing "is properly determined by inquiring whether the evidence viewed in the light most favorable to the

People, if unexplained and uncontradicted, would warrant conviction by petit jury." *Jennings*, 69 N.Y.2d at 114, *citing People v. Pelchat*, 62 N.Y.2d 97, 105, 476 N.Y.S.2d 79 (1984). Since matters of credibility must be resolved in favor of the People, the standard effectively becomes one of "reasonable cause," determined through the eyes of the hypothetical "reasonable person." *Id.*, at 115; CPL § 70.10(2). This test applies to both direct and circumstantial evidence. *Id.*

Murder in the Second Degree

The evidence adduced by the People could not have supported a finding to indict the defendant on the charge of Murder in the Second Degree as the People could not have established that Mr. Comello intended to cause Mr. Cali's death. PL §§ 15.05(1), 125.25(1). Additionally, at the time of the incident the defendant was unable to appreciate the wrongfulness of his actions. *See* May 3, 2019 notice of intent to present evidence of mental disease or defect. Mr. Comello not only believed that Mr. Cali represented a serious and imminent threat to his life, but also that Mr. Cali constituted a grave threat to the citizens of the United States. Consequently, Mr. Comello was unable to appreciate that killing him was wrong. *See* PL § 40.15(2). The People's inability to present evidence concerning these essential elements of the charge must result in the dismissal of that charge. *People v. Reagan*, 256 A.D.2d 487, 490, 683 N.Y.S.2d 483 (2nd Dept.) *aff'd* 94 N.Y.2d 804 (1998).

Mr. Comello's Lack of Intent

To present a *prima facie* case to the Grand Jury for Murder in the Second Degree, the People must have established that the defendant intended to cause the death of another person, and caused such death. *People v. Brahney*, 29 N.Y.3d 10, 13 (2017); PL § 125.25(1). While it is clear that a murder cannot be perpetrated without a killing, one may certainly kill without committing murder. Since intent is an essential element of the crime of murder, if the prosecution

is unable to establish intent, then the charge must be dismissed. *People v. Fraser*, 126 A.D.2d 740, 740, 511 N.Y.S.2d 326 (2nd Dept. 1987); *People v. Clarke*, 43 A.D.2d 834, 834, 351 N.Y.S.2d 14 (2nd Dept. 1974).

Here, the People could not have possibly presented evidence to the Grand Jury that Mr. Comello's actions demonstrate an intent to kill Mr. Cali. The facts and circumstances of the case suggest the opposite. In both the videotaped interrogation of the defendant, as well as the video surveillance depicting Mr. Comello at 25 Hilltop Terrace, it is clear that when the defendant initially approached Mr. Cali's front door, he was unarmed. *See* March 16, 2019 Videotaped Statement of Anthony Comello, at 26:28; *see also* Video Surveillance of 25 Hilltop Terrace, at 8:55 p.m.[13] He further stated that he left his firearm hidden in his vehicle. *Id.*, at 29:06. Had Mr. Comello actually gone to the location for the specific purpose of shooting Mr. Cali, he clearly would not have engaged Mr. Cali without the firearm in close proximity. The presence of the firearm in Mr. Comello's vehicle combined with the decedent's status as a high-ranking member of an organized crime association, and the defendant's apparent knowledge of this fact, illustrate that Mr. Comello did not intend to engage in a violent encounter. Due to Mr. Cali's status as an organized crime boss and his own willingness to engage in illegal and/or violent acts, Mr. Comello believed that that Mr. Cali may have been in possession of a weapon when he answered the door. Intending to effect a peaceful citizen's arrest, Mr. Comello did not actively seek to escalate the situation to a violent end by possessing a firearm during their initial encounter.

In fact, the defendant only retrieved his firearm upon seeing Mr. Cali make a furtive movement in the vicinity of his waistband, which caused him to believe that Mr. Cali intended to

[13] Either relevant portions or a complete copy of the defendant's videotaped interrogation or of 25 Hilltop Terrace surveillance video will be provided to the Court upon request.

commit an act of violence against him because Mr. Comello had just informed Mr. Cali of his intention to effect a citizen's arrest. It is evident that the shooting was the result of significant provocation on the part of Mr. Cali rather than from any premeditation by the defendant. Mr. Comello admitted that he did have a firearm, but its hidden position in his vehicle is instructive on the defendant's mental state at all relevant times during this incident. By Mr. Comello's own admission, however, the presence of the firearm in his vehicle while he traveled to Mr. Cali's house is not significant as he informed the law enforcement agents that he always keeps the firearm nearby (*see id.*, at 26:50) because "the world is a dangerous place." *Id.*, at 27:11.

Additionally, Mr. Comello brought a set of handcuffs with him to Mr. Cali's house. Had Mr. Comello simply intended to lure Mr. Cali out of his house and murder him, there would have been no need to bring any elements of restraint. The presence of these handcuffs demonstrates that Mr. Comello was actually planning to effect a citizen's arrest on Mr. Cali, rather than shoot him.

This is not the first time that Mr. Comello has attempted to place someone under a citizen's arrest. Approximately a month prior to this incident, the defendant attempted to effect a citizen's arrest on Mayor Bill de Blasio at Gracie Mansion. Mr. Comello was rebuffed by the mayor's security detail but approached Mayor de Blasio's residence calling for him to come outside and submit to a citizen's arrest for election fraud.[14] On another occasion, he tried to personally arrest and detain California Congressional Representatives Maxine Waters and Adam Schiff in the vicinity of the Southern District of New York Courthouse. Mr. Comello believed the two Congress members were in the area, so he went to the U.S. Marshal's office at 500 Pearl Street,

[14] Mr. Comello has cellular telephone video footage of himself attempting to effect this citizen's arrest, which will be made available to the Court upon request.

New York, New York but was unsuccessful in securing their assistance in his attempt to arrest both representatives. Similar to Mr. Cali, the defendant believed that these individuals were guilty of breaking the law and should face the justice system, and at no point did he ever intend to commit any acts of violence against them, and no violence ever ensued during his previous attempts despite the defendant's failure to successfully effect those arrests.

Mr. Comello's Inability to Appreciate the Wrongfulness of his Actions

Mr. Comello harbored the belief that Francesco Cali was not only a high-ranking member of a New York City organized crime organization, but that he also held a significant status in a worldwide criminal cabal bent on the destruction of American values and the American way of life. The defendant believes he has intimate knowledge of the membership and inner-workings of this international criminal conspiracy and has made previous attempts to thwart what he perceives to be their plans through his failed efforts to arrest New York City Mayor Bill de Blasio as well as California U.S. Representatives Maxine Waters and Adam Schiff.

In the defendant's mind, the individuals involved in this secret criminal conspiracy, which he believes to be what is colloquially known as "the Deep State," seek the complete destruction of the United States of America and work to undermine its values at every opportunity. The source for Mr. Comello's knowledge on this topic is known by the moniker "Q," and has a following called "QAnon," who support Q in his or her attempts to aid President Trump in fighting a shadow war with the cabal. *See*, *supra*, **STATEMENT OF FACTS, Background.** This belief permeated every aspect of the defendant's conduct and dictated his actions.

Mr. Comello was certain that Mr. Cali held a role as a prominent criminal through his association with the Deep State and, considering himself to be a patriot, Mr. Comello felt compelled to take Mr. Cali into custody and deliver him, handcuffed, to the military (the

defendant believes that members of traditional law enforcement have been corrupted by the Deep State). It was never the defendant's plan to execute Mr. Cali outside his home.

However, the defendant believed Mr. Cali to be an exceptionally dangerous person, and, after informing Mr. Cali of his intention to take the decedent into custody, he observed Mr. Cali move his hand towards his waistband. At this point, believing that Mr. Cali was about to shoot him, he retrieved his own firearm from his vehicle, which he had been standing next to, and fired at Mr. Cali. Even though Mr. Comello did not go to the Cali residence expecting any violence to ensue, because of who he believed Francesco Cali to be, the defendant did not – and still does not – believe that killing Mr. Cali was wrong. Rather, he believes that he did his patriotic duty to defend both himself as well as the United States from a dangerous criminal and therefore killing Mr. Cali was actually morally right under the circumstances.

The totality of these circumstances does not support the theory that Mr. Comello intended to kill Mr. Cali. Rather, it is clear that the defendant intended to make a citizen's arrest, place Mr. Cali in handcuffs, and deliver him to what Mr. Comello believed would be the appropriate, uncorrupted authorities. These facts simply do not support a charge of Murder in the Second Degree.

The Prosecutor's Failure to Give Proper Instructions

Clearly, without adequate instructions, no group of human beings can intelligently gauge whether or not an indictment should be returned. Thus, when the prosecutor, as legal advisor to the Grand Jury, fails to properly instruct the jurors on the applicable law, the indictment must be dismissed. *See, e.g., People v. Barysh*, 95 Misc.2d 616, 408 N.Y.S.2d 190 (Sup. Ct. N.Y. Co. 1978) (failure to apprise the Grand Jury that intent to defraud is an essential element of the crime of falsifying business records); *People v. Darcy*, 113 Misc.2d 580, 449 N.Y.S.2d 626 (Co. Ct.

Yates Co. 1982) (in a case involving the illegal receipt of food stamps, prosecutor failed to instruct on the applicable regulations governing their use); *People v. Garcia*, 103 Misc.2d 915, 427 N.Y.S.2d 360 (Sup. Ct. Bronx Co. 1980) (improper instructions concerning possession of a weapon); *People v. Tucker*, 101 Misc.2d 660, 421 N.Y.S.2d 792 (Co. Ct. Suffolk Co. 1979) (failure to instruct the Grand Jury that invocation of an alibi defense does not shift the burden of proof to the defendant).

There are, obviously, myriad ways in which the prosecutor's instructions could have been inadequate in the instant case. Thus, if the prosecutor undertook "to advise, inform, or explain the law, he must [have done] so correctly, and intelligently ... [without] otherwise jeopardiz[ing] the proceeding." *Ehrlich*, 518 N.Y.S.2d at 746. Given the tenuousness of the evidence on which the People's allegations rely, the defendant respectfully requests that the Court review the Grand Jury minutes to ensure that the elements of the substantive crimes were properly charged.

B. Procedural Defects

In addition to the aforementioned substantive problems, the defendant requests that this Court carefully review the Grand Jury minutes to ascertain whether any statutory violations occurred.

First, the Court is asked to determine whether the term of the Grand Jury which voted the instant indictment was extended and, if it was, whether the extension was proper. Criminal Procedural Law § 190.15(1) provides:

> A term of a superior court for which a grand jury has been impaneled remains in existence at least until and including the opening date of the next term of such court for which a grand jury has been designated. Upon such date, or within five days preceding it, *the court may, upon declaration of both the grand jury and the district attorney that such grand jury has not yet completed or will be unable to complete certain business before*

> *it, extend the term of court and the existence of such grand jury to a specified future date*, and may subsequently order further extensions for such purpose.

(Emphasis supplied). Where an indictment has been voted by a Grand Jury extended in derogation of this section, it "is a nullity." *Matter of McClure v. County Court of County of Dutchess*, 41 A.D.2d 148, 150-51, 341 N.Y.S.2d 855 (2nd Dept. 1973) (indictment voted by Grand Jury which had been extended upon application of only the District Attorney). *See also Matter of Four Reports of Nassau County Grand Jury*, 382 N.Y.S.2d 1013, 1022, 87 Misc.2d 453 (Co. Ct. Nassau Co. 1976) (if Grand Jury term is extended, it may consider only matters before it during its original term).

Second, the Court should determine whether the proceedings were defective within the meaning of CPL §§ 190.25(1) and 210.35(2) and (3) if fewer than 16 Grand Jurors were present at any session or fewer than 12 Grand Jurors concurred in the finding of any count of the Indictment. As Justice Rothwax noted:

> [t]he Grand Jury is interposed 'to afford a safeguard against oppressive actions of the prosecutor or a court' (*United States v. Cox*, 342 F2d 167, 170, *cert den sub nom Cox v. Hauberg*, 381 U.S. 935). The decision to hale a person into a court is a serious one, and subject to official abuse. For this reason the concurrence of 12 citizens is required before a defendant is tried on a felony charge .... An indictment found without that concurrence is defective and must be dismissed.

People v. Colebut, 86 Misc.2d 729, 734, 838 N.Y.S.2d 985 (Sup. Ct. N.Y. Co. 1976) *citing Stirone v. United States*, 361 U.S. 212, 218 (1960).

Third, it is important that the Court ascertain whether "at least twelve of the Grand Jurors, who voted to indict, heard all essential and critical evidence." *People v. Brinkman*, 309 N.Y. 974, 975 (1956) (emphasis supplied). Simply stated, many serious felony cases:

> in New York County, are not presented and submitted at one sitting, and often the Grand Jury does not resume the proceeding until weeks later. During this interval the same panel may hear other interrupted cases.

Colebut, 86 Misc.2d at 732, 383 N.Y.S.2d 985. Since, unfortunately, not every juror is present at each session, extended proceedings may well culminate in some jurors voting without the benefit of knowing all of the facts.

Fourth, the Court should review the Grand Jury minutes to determine whether any unauthorized persons were present in the Grand Jury room during any portion of the proceedings pursuant to Criminal Procedure Law § 190.25(3). Where any of its provisions are violated, the indictment must be dismissed. As noted by the Court of Appeals:

> Secrecy is a vital requisite of Grand Jury proceedings (CPL 190.25, subd. 4) and its actions and deliberations must be 'uninfluenced by the presence of those not officially connected with it' (*People v. Minet*, 296 N.Y.315, 323, 73 N.E.2d 529, 533). The unauthorized appearance of [any person] infringes upon the secrecy requirement, thereby impairing the integrity of the proceeding.

People v. DiFalco, 44 N.Y.2d 482, 488 (1978); s*ee also People v. Beauvais*, 98 A.D.2d 897, 898, 470 N.Y.S.2d 887 (3rd Dept. 1983).

Fifth, the minutes should be inspected to determine whether the right of the jurors to ask questions of the witnesses was in any way impaired. Given the Grand Jury's role as a check against the unbridled exercise of prosecutorial discretion, it is vital that the jurors' right to ask questions not be restricted. *See Matter of Four Reports of the Nassau County Grand Jury, supra,* 87 Misc.2d at 453.

Sixth, the Court should determine whether each witness before the Grand Jury was properly sworn. See CPL §§ 60.20 and 190.25(2). As stated in *People v. Vazques*, 119 Misc.2d 896, 897, 464 N.Y.S.2d 685 (Sup. Ct. N.Y. Co. 1983);

> [w]ith the possible exception of a person suffering from mental disease or defect, CPL 60.20 provides an absolute bar against any witness over the age of twelve from testifying without first taking an oath ... The testimonial oath serves two discrete purposes: to alert the witness to the moral duty to testify truthfully and to deter false testimony through the sanction of perjury.

See also People v. Zigles, 119 Misc.2d 417, 418-419, 463 N.Y.S.2d 352 (Co. Ct. Suffolk Co. 1983). This mandate applies with equal force to Grand Jury proceedings. *People v. Schweain*, 122 Misc.2d 712, 713, 471 N.Y.S.2d 729 (Sup. Ct. Bronx. Co. 1983); *People v. Vazquez*, *supra*, 119 Misc.2d 896, 464 N.Y.S.2d at 686-687.

Seventh, this Court should ascertain whether any of the evidence presented to the Grand Jury was hearsay. With certain exceptions (see CPL § 190.30(2) and (3)), evidence presented to the Grand Jury must meet the same standards of admissibility as evidence introduced at trial. CPL §§ 190.30(1) and 60.10. Thus, hearsay is inadmissible and, if it forms any part of the factual basis of the indictment, the indictment must be dismissed. *People v. Cornachio*, 46 A.D.2d 690, 360 N.Y.S.2d 266 (2nd Dept. 1974); *People v. Ehrlich*, *supra*, 518 N.Y.S.2d at 746; *People v. Sanchez*, 125 Misc.2d 394, 397, 479 N.Y.S.2d 602 (Sup. Ct. Kings Co. 1984).

Eighth, the Court should determine whether all legal instructions given to the Grand Jury were recorded in its minutes in accordance with the mandate of CPL §190.25(6). Thus, if any or all of the instructions were not recorded, the indictment must be dismissed. *People v. Rallo*, 46 A.D.2d 518, 520, 363 N.Y.S.2d 851 (4th Dept. 1975), *aff'd*, 39 N.Y.2d 217, 383 N.Y.S.2d 271

(1976); *People v. Percy*, 45 A.D.2d 284, 286-287, 358 N.Y.S.2d 434 (2nd Dept. 1974), *aff'd*, 38 N.Y.2d 806, 382 N.Y.S.2d 39 (1975).

POINT IV

MR. COMELLO'S STATEMENTS TO LAW ENFORCEMENT MUST BE SUPPRESSED BECAUSE THEY WERE ILLEGALLY OBTAINED

The People served notice that they intend to offer at trial statements allegedly made by the defendant on March 16, 2019. These statements were involuntary, resulting from custodial interrogation, and require suppression. *Miranda v Arizona*, 384 U.S. 436, 461 (1966); *People v. Berg*, 92 N.Y.2d 701, 704 (1999); CPL §§ 60.45, 710.20(3). Alternatively, the defendant requests a *Huntley* hearing, and additionally moves to suppress all other statements for which the People have not served timely notice. CPL § 710.30(1)(a); *People v. Huntley*, 15 N.Y.2d 72, 78 (1965) ("Judge must find voluntariness beyond a reasonable doubt before [a statement] can be submitted to the trial jury"). Notably, where voluntariness is contested, the Court may not "summarily deny suppression motions for lack of adequate factual allegations." *People v. Mendoza*, 82 N.Y.2d 415, 421 (1993); CPL § 710.60(3)(b).

According to the People, Mr. Comello provided a videotaped statement to Detectives Guariano and Gormely on March 16, 2019 at the Ocean County Prosecutor's Office, in Toms River, New Jersey. *See* People's Voluntary Disclosure Form ("VDF"), attached as Exhibit E, at p. 2. On information and belief, these statements were involuntary and are the product of custodial interrogation. Consequently, they must be suppressed.

POINT V

THE PEOPLE SHOULD BE REQUIRED TO DISCLOSE THE NAMES AND CONTACT INFORMATION FOR THEIR TRIAL WITNESSES

The People have provided no information as to who will be testifying, either as expert or lay witnesses, and accordingly, such disclosures should be now ordered. Indeed, without this information, Mr. Comello will be unable to "participate in the truth-finding process," and he will be at a severe disadvantage at trial. *Bottom*, 76 Misc.2d at 527; *see also People v. McCray*, 23 N.Y.3d 193, 12 N.E.3d 1079 (2014) (Rivera, J., dissenting and emphasizing the necessity of learning witness details to assess the "reliability" of testimony and "develop ... questioning favorable to the defense ... and issues important to the truth finding process").

"It is well established that the trial court has the discretion to order the pretrial release of the names and addresses of the People's witnesses ...." *People v. Torres*, 164 A.D.2d 923, 923, 559 N.Y.S.2d 584 (2nd Dept. 1990); *see also People v. Rhodes*, 154 A.D.2d 279, 279, 546 N.Y.S.2d 583 (1st Dept. 1989); *People v. Arrellano*, 150 Misc.2d 574, 575, 569 N.Y.S.2d 574. Materiality and the potential for witness intimidation are the two key factors in determining the propriety of any request for witness names and contact information. *People v. Rivera*, 119 A.D.2d 517, 519, 501 N.Y.S.2d 38 (1st Dept. 1998).

First, any "fear" that a prospective prosecution witness will be subject to intimidation must be "founded." *Mojica*, 244 A.D.2d at 144-5. "[A] remote and unlikely possibility of witness intimidation cannot override all other considerations. It is too convenient an excuse for a prosecutor to use in all cases when what is really feared is that defense counsel will learn the weaknesses in the People's case or will develop impeachment material." *Arrellano*, 150 Misc.2d

at 577. By way of example, fears held to be sufficiently "founded" (*id.*, at 576) to preclude disclosure have been substantiated by: 1) threats of violence made to two witnesses who were also offered money not to testify[15]; 2) the existence of witness assassination contracts issued by the defendant's fellow gang members and the execution of another prosecution witness by the same gang in a prior case[16]; and 3) the defendant's admission that he shot the complaining witnesses precisely because he believed that he was a government informant.[17] No such fears exist in this case – he is being detained apart from the general population, and there has been no indication that the People believe any other individual participated in this alleged crime – and the People cannot credibly claim that a substantiated threat of intimidation prevents them from providing the information that we seek.

Second, even if there were some fear of intimidation, it would be handily outweighed by counsel's need to interview the witnesses and retrieve records that might affect their reliability. *Mojica*, 244 A.D.2d at 142; *McCray*, 23 N.Y.3d at 193 (Rivera, J., dissenting). At the very least, the anticipated testimony of these witnesses will have a direct and "material bearing upon the guilt or innocence of the ... defendant[]," *People v. Bianco*, 169 Misc. 2d 127, 132, 642 N.Y.S.2d 815 (Crim. Ct. Kings Co. 1996)) and the identities and contact information should be disclosed forthwith so that counsel and experts for the defendant can have the opportunity to interview them. *Rivera*, 119 A.D.2d at 519.

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[15] *Id.*; *see also People v. Guzman*, 176 A.D.2d 561, 562, 575 N.Y.S.2d 26 (1st Dept. 1991) (fear of intimidation substantiated by threats made to "one or more witnesses ... if they were to testify," and defendant's criminal record which included two prior homicide convictions).

[16] *People v. Boyd*, 164 A.D.2d 800, 802, 560 N.Y.S.2d 15 (1st Dept. 1990).

[17] *Torres*, 164 A.D.2d at 923.

Should this Court find that the balance still weighs in favor of non-disclosure, additional steps may be taken to ensure witness safety. For example, the People could arrange for interviews of their witnesses to be conducted by defense counsel and a private investigator or expert at the District Attorney's office. *See, e.g., Mojica*, 244 A.D.2d at 144-5; *Robinson*, 207 A.D.2d at 363; *People v. Arthur*, 175 Misc.2d 742, 767, 673 N.Y.S.2d 486 (Sup. Ct. N.Y. Co. 1997). Alternatively, the Court could order counsel not to share witness contact information with the defendant (*Arrellano*, 150 Misc.2d at 577), or order only the early disclosure of the expert witness. These measures would help ensure that the defendant is guaranteed a fair trial.

Finally, as noted *supra*, in **POINT I**, changes to the criminal procedure law regarding the information which must be turned over and the time table for providing that information will take effect January 1, 2020. One of these changes is that shortly after an arrest, the People will be required to provide the names and contact information for **any** person with relevant information (including law enforcement agents) to the defendant. Although the law has not yet taken effect, clearly the legislature views disclosure of this information soon after the arraignment to be appropriate and the Court should exercise its discretion and order the People to immediately turn over this information.

POINT VI

THE COURT SHOULD ORDER THE IMMEDIATE DISCLOSURE OF ALL *BRADY* MATERIAL

There can be no doubt that *Brady* materials are inherently discoverable, and given the severity of the charges in this case, with its accompanying potential maximum sentence of life in prison upon conviction, they should be disclosed immediately. *Arthur*, 175 Misc.2d at 765 ("every effort must be made to disclose ... at a sufficiently early point in the proceedings to afford

the defense a meaningful opportunity to investigate it and evaluate its application to its strategy ... or the fundamental fairness required by due process may be lacking"); *People v. Crespo*, 168 Misc.2d 182, 186, 637 N.Y.S.2d 158 (Sup. Ct. Bronx Co. 1995); *Bottom*, 76 Misc.2d at 528 ("if the accused is to be a full-fledged participant in the truth-finding process, then favorable evidence in the People's possession should be made available at the earliest possible opportunity in advance of trial"). If there is any "doubt" concerning a particular item, "the prosecutor is not to decide ... for the defense what is useful," (*Andre W.*, 44 N.Y.2d at 185 (internal citation and quotation marks omitted)) and the Court may review that item in camera to determine if it should be disclosed. *Arthur*, 175 Misc.2d at 762.

Specifically, in this case, the defense demands that the People turn over any information (whether contained in the search warrant documents or any other source) that, at the time of the shooting, Mr. Cali possessed any firearms, or any other weapons on his person, in his vehicle or in his home. This information is critical to a self-defense claim.

POINT VII

THE COURT SHOULD ORDER THE IMMEDIATE DISCLOSURE OF ALL *GIGLIO* MATERIAL

Mr. Comello respectfully requests that the Court order the People to immediately disclose the existence of any inducements, promises, payments of witness fees, or any other agreements made with persons the People intend to call at trial. *Giglio*, 405 U.S. at 154; *People v. Novoa*, 70 N.Y.2d 490, 496 (1987) ("it is now firmly established that the existence of an agreement between the prosecution and a witness, made to induce the testimony of the witness, is evidence which must be disclosed under *Brady* principles"); *People v. Cwikla*, 46 N.Y.2d 434, 441 (1979). As

with the requested *Brady* material, timely production of *Giglio* material will ensure that the defendant has an adequate opportunity to investigate and properly exploit the information.

POINT VIII

THE PEOPLE SHOULD PROVIDE A DATE WHEREBY ALL *ROSARIO* MATERIAL WILL BE DISCLOSED

Mr. Comello respectfully requests that the People disclose the date whereby they will turn over all prior statements of individuals that they intend to call at trial, pursuant to *People v. Rosario*, 9 N.Y.2d at 290-91.

POINT IX

THE PEOPLE SHOULD PROVIDE NOTICE OF ANY PRIOR BAD ACTS THAT THEY INTEND TO OFFER AT TRIAL

The defendant requests the immediate disclosure of any prior crimes or bad acts that the People intend to offer at trial – as either substantive in their direct case or impeachment evidence should he testify – and a pretrial hearing to determine their admissibility. In this way, the defendant can make an informed decision as to whether or not to testify, protecting his right to a fair trial. *See, generally, Ventimiglia*, 52 N.Y.2d at 360 (1981); *People v. Santarelli*, 49 N.Y.2d 241, 258 (1980); *People v. Kennedy*, 47 N.Y.2d 196, 205-6 (1979); *People v. Sandoval*, 34 N.Y.2d at 375 (1974); *People v. Molineux*, 168 N.Y. 264, 334-35 (1901); CPL § 240.43.

POINT X

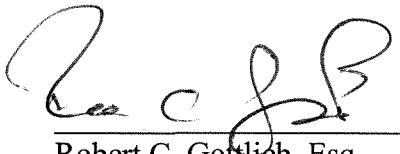
THE DEFENDANT EXPRESSLY RESERVES THE RIGHT TO MAKE ANY FURTHER MOTIONS WHICH ARE NECESSITATED EITHER BY THE PEOPLE'S DISCLOSURE OF DOCUMENTS OR INFORMATION, OR BY THE DISCOVERY OF NEW FACTS OF WHICH THE DEFENDANT IS PRESENTLY UNAWARE

CONCLUSION

For the forgoing reasons, Anthony Comello's pretrial motions should be granted in their entirety.

Dated: New York, New York
July 19, 2019

Respectfully submitted,



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